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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

TERESA MACCLELLAND; KAREN
UMBERGER; SCOTT WILLITS; MICHAEL
BRANOM; MOLLY BROWN; MICHAEL
CARNEY; TIM FRASCH; PATRICIA
GAGAN; ANNA GUTIERREZ; LINDA
JENKINS; AUGUSTUS JOHNSON;
WILLIAM KAUPELIS; MARILYN KAYE;
JANETTE LISNER; WILLIAM ERIC
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MONSOUR; DARLEEN PEREZ;
GABRIELLE POZZUOLI; VALERIE REED;
BRUCE SCHRAMM; KERRY
SHOWALTER; JOHN ST. JARRE; GLORIA
STERN; EDNA TOY; TERESA TOY; and
VANESSA WEST; For Themselves, As Private
Attorneys General, and On Behalf Of All Others
Similarly Situated,

Plaintiffs,

v.

CELLCO PARTNERSHIP D/B/A VERIZON
WIRELESS; and VERIZON
COMMUNICATIONS INC.,

Defendants.

Case No. 3:21-cv-08592-EMC

**PLAINTIFFS' ADMINISTRATIVE
MOTION TO TAKE OFF
CALENDER MOTION FOR
EQUITABLE REDISTRIBUTION
(DKT. NO. 90)**

[Civil L.R. 7-11]

[Hon. Edward M. Chen]

RELIEF REQUESTED

Plaintiffs Teresa MacClelland, Et Al. (collectively, “Plaintiffs”) respectfully request that this Court take off calendar the premature Motion For Equitable Redistribution (Dkt. No. 90) that was filed by Proposed Intervenors Allison Hayward, Peter Heinecke, Lawrence Prince and Will Yeatman (collectively, “Proposed Intervenors”). Plaintiffs also respectfully request that this Court vacate the briefing schedule and hearing for the Motion For Equitable Redistribution. This Court needs to rule upon the Proposed Intervenors’ Motion To Intervene (Dkt. No. 89) before ruling upon the Motion For Equitable Redistribution, which the Proposed Intervenors can only bring *if and after* this Court grants their Motion To Intervene. The Proposed Intervenors can, of course, re-notice their Motion For Equitable Redistribution in the event the Court allows them to intervene.

REASON FOR ABSENCE OF STIPULATION

On February 27, 2024, counsel for Plaintiffs emailed counsel for Proposed Intervenors with a request that they stipulate to taking the Motion For Equitable Distribution off calendar until after the resolution of the Motion To Intervene. *See* Email from P.K. Lukacs to T. Frank & F. Bednarz, sent at 2:22 p.m. on Feb. 27, 2024 (Exhibit A to Declaration of Paul Karl Lukacs, filed simultaneously herewith). Counsel for Proposed Intervenors declined to stipulate and indicated that this Administrative Motion would be opposed. *See* Email from F. Bednarz to P.K. Lukacs, sent at 7:37 p.m. on Feb. 27, 2024 (Exhibit A to Lukacs Declaration).

BACKGROUND FACTS

This is a class action in which Plaintiffs allege false advertising and deceptive practices claims on behalf of a class of California consumers against Defendants Cellco Partnership d/b/a Verizon Wireless and Verizon Communications Inc. (collectively, “Verizon”) regarding Verizon’s monthly Administrative Charge. *See* Sec. Am. Comp., ¶¶ 1-14 (Dkt. No. 58); Lukacs Decl., ¶ 2.

As this Court is aware, this class action is being settled along with three other class actions and more than thirteen thousand individual arbitrations in the New Jersey Superior Court proceeding captioned *Dean Esposito v. Cellco Partnership d/b/a Verizon Wireless*, New Jersey Superior Court Middlesex County Law Division Docket No. MID-L-6360-23 (“*Esposito*”). *See* Stipulation and Order Continuing Status Conference, dated Dec. 28, 2023, at second Whereas

1 clause (Dkt. No. 85); Lukacs Decl., ¶ 3. Verizon is headquartered in New Jersey, and the New
2 Jersey Superior Court has general jurisdiction over Verizon with regard to claims from all over the
3 country. Lukacs Decl., ¶ 4.

4 On December 15, 2023, the New Jersey Superior Court in *Esposito* granted preliminary
5 approval to a proposed nationwide class action settlement agreement with a non-reversionary
6 settlement fund of \$100 million. *See* Lukacs Decl., ¶ 5; *see also* Stipulation and Order Continuing
7 Status Conference, dated Dec. 28, 2023, at first Whereas clause (Dkt. No. 85). Among other
8 provisions, the Preliminary Approval Order appointed as class counsel the attorneys Daniel M.
9 Hattis, Esq., and Paul Karl Lukacs, Esq., of the Hattis & Lukacs law firm and Stephen DeNittis,
10 Esq., Joseph A. Osefchen, Esq., and Shane T. Prince, Esq., of the DeNittis Osefchen Prince, P.C.,
11 law firm. Lukacs Decl., ¶ 5.

12 The Fairness Hearing is scheduled to occur on March 22, 2024. Lukacs Decl., ¶ 6. If the
13 New Jersey Superior Court grants final approval to the settlement agreement, then the settlement
14 will resolve claims by Verizon customers from all 50 states and the District of Columbia. *Ibid.* If
15 given final approval, the settlement agreement will resolve four class actions against Verizon
16 (including this *MacClellan* case) as well as 13,539 individual arbitration demands against Verizon.
17 *Ibid.*

18 On January 31, 2024, the class counsel in *Esposito* (most of whom are also the counsel of
19 record in this *MacClelland* case) moved in the New Jersey court for an attorneys' fees award of
20 \$33.3 million—an amount comprised of exactly 33.3% of the settlement fund. Lukacs Decl., ¶ 7.
21 The amount requested also equaled the class counsels' lodestar, plus a lodestar multiplier of 1.945.
22 *Ibid.* As argued at length in the motion for attorneys' fees filed in *Esposito*, the amount requested
23 is consistent with Third Circuit and New Jersey law. *Ibid.* No attorneys' fees have been awarded
24 yet. *Ibid.*

25 Proposed Intervenor Allison Hayward, Peter Heinecke, Lawrence Prince and Will
26 Yeatman (collectively, "Proposed Intervenor") criticize the attorneys' fees request in *Esposito* as
27 too rich. Lukacs Decl., ¶ 8. In Proposed Intervenor's opinion, since the multiple class actions and
28 arbitration demands that are being settled in *Esposito* purportedly originated with this "first-filed"

1 action in *MacClelland*, the attorneys' fees for the entire nationwide settlement should be governed
 2 by a supposed Ninth Circuit benchmark of 25% of the settlement fund. *Ibid.* Proposed Intervenor
 3 also argue that class counsel should receive no fees on the grounds that settling the class actions in
 4 an omnibus fashion in New Jersey breached a fiduciary duty to obtain the best settlement for the
 5 class.¹ *Ibid.* (Proposed Intervenor do not challenge any other aspect of the settlement—only the
 6 attorneys' fees. *Ibid.*)

7 Obviously, Plaintiffs and their counsel strongly disagree with Proposed Intervenor's
 8 arguments.

9 But the key point for now is that—for reasons that remain obscure and dumbfounding—
 10 Proposed Intervenor did *not* file an objection in the *Esposito* action. Lukacs Decl., ¶ 10. The
 11 deadline to object to the class action settlement was Monday, February 26, 2024, but Proposed
 12 Intervenor did *not* file an objection for the New Jersey court to review at the Fairness Hearing.
 13 *Ibid.*

14 Instead, the path that Proposed Intervenor chose to take was to file two motions in this
 15 *MacClelland* action—a Motion To Intervene (Dkt. No. 89) and a Motion For Equitable
 16 Redistribution (Dkt. No. 90). Lukacs Decl., ¶ 11. In the Motion To Intervene, Proposed
 17 Intervenor request mandatory or permissive intervention. *Ibid.* In the Motion For Equitable
 18 Redistribution, Proposed Intervenor request that this Court reduce the class counsels' attorney
 19 fees in the *Esposito* action to either 25% of the settlement fund or to zero. *Ibid.*

20 This Court is scheduled to hear both motions on April 4, 2024. Plaintiffs' oppositions to
 21 both motions are due on March 8, 2024—which is 14 days after the motions were filed.

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 25 ¹ Proposed Intervenor argue that class counsel forum-shopped in filing *Esposito* in New
 26 Jersey state court. But Proposed Intervenor ignore that three other class actions were filed against
 27 Verizon by class counsel in New Jersey state and federal courts—including *Achey v. Cellco*
 28 *Partnership d/b/a Verizon Wireless*, 293 A.3d 551 (N.J. App. Div. 2023), which was filed in New
 Jersey state court on January 11, 2022 (only two months after *MacClelland*) and which was
 litigated to the New Jersey Supreme Court after the plaintiffs prevailed in a published Appellate
 Division decision. *See* Lukacs Decl., ¶ 9.

ARGUMENT

The problem is obvious: This Court cannot rule on the Motion For Equitable Redistribution unless and until it first grants the Motion To Intervene. The Proposed Intervenor must be adjudicated to be actual intervenors and therefore parties before the Court can determine if they are entitled to relief. *See, e.g., People Who Care v. Rockford Board of Education School District No. 205*, 171 F.3d 1083, 1089 (7th Cir. 1999) (“an applicant for intervention is not a party—he wants to *become* a party”) (emphasis in original; citations omitted). Proposed Intervenor tacitly acknowledged this sequence of decision by filing the Motion To Intervene (Dkt. No. 89) *before* filing the Motion For Equitable Redistribution (Dkt. No. 90).

It would be a waste of this Court’s and Plaintiffs’ resources to work up the Motion For Equitable Redistribution if this Court moots the motion by denying the Motion To Intervene. Plaintiffs have very strong and numerous arguments against the Motion To Intervene, some of which are supported by this Court’s own orders denying intervention. It will be a challenge for Plaintiffs to fit all of their arguments into this Court’s 25-page limit (but it will be done).

This Court should review the intervention arguments separately from the equitable redistribution arguments. The two motions sound in completely different fields of law. The intervention motion is a procedural motion that cites (unsuccessfully) the well-established provisions of Fed.R.Civ.P. 24. The equitable redistribution motion is based on nebulous theories of equity, fairness and duty. The motions are distinct in concept and remedy and should be treated as such for briefing and argument purposes.

Proposed Intervenor contend that “[t]he motion to intervene depends on the relief we request” and that “the merits of the motions are linked[.]” Email from F. Bednarz to P.K. Lukacs, sent at 7:37 p.m. on Feb. 27, 2024 (Exhibit A to Lukacs Declaration). These contentions are contrary to Ninth Circuit precedent, which makes a clear distinction between the motion to intervene (in which the district court focuses on the sufficiency of a proposed Complaint In Intervention) versus the adjudication of the merits of a now-approved Complaint In Intervention.

1 *See Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 820 (9th Cir. 2001).² The
 2 Motion To Intervene is at heart a pleading motion. The gravamen of the Motion For Equitable
 3 Redistribution is that of a summary judgment motion seeking to prove the allegations pleaded in
 4 the Complaint In Intervention. These two types of motions are customarily decided separately.

5 Counsel for Plaintiffs cannot realistically brief both motions within the 14-day briefing
 6 window. Lukacs Decl., ¶ 13. Counsel for Plaintiffs are also class counsel in *Esposito* and are in the
 7 process of drafting filings and preparing for the Fairness Hearing on March 22, 2024. *Ibid.*

8 Plaintiffs have satisfied the criteria laid out in Paragraph 4 of this Court’s Civil Standing
 9 Order—General for an order changing the Court’s calendar. Lukacs Decl., ¶ 14. Proposed
 10 Intervenors would not agree to a stipulation. *Ibid.* Plaintiffs are filing this Administrative Motion
 11 three court days after receiving the two motions and a week-and-a-half before the opposition due
 12 date of March 8, 2024. *Ibid.* Plaintiffs have been diligent. *Ibid.*

13 Plaintiffs can prepare a strong and thorough opposition to the Motion To Intervene by next
 14 Friday, but Plaintiffs would be prejudiced if they were forced to rush and prepare the opposition to
 15 the Motion For Equitable Redistribution during the same time frame. (And the Court should be
 16 aware that Proposed Intervenors filed their motions out of the blue, with no forewarning and
 17 certainly no meeting and conferring about a mutually agreeable briefing schedule. *Ibid.*)

18 By contrast, Proposed Intervenors will not be prejudiced if this Court hears the motions in
 19 sequence. In the event the Proposed Intervenors ultimately obtain a Judgment on their Complaint
 20 In Intervention, they can enforce that Judgment in the same manner as any other litigant.

21 For the reasons stated, Plaintiffs respectfully request that the Court grant this
 22 Administrative Motion.

24 ² The standard laid by the Ninth Circuit is: “Courts are to take all well-pleaded,
 25 nonconclusory allegations in the motion to intervene, the proposed complaint or answer in
 26 intervention, and declarations supporting the motion as true absent sham, frivolity or other
 27 objections. District courts may often be able to determine whether a prima facie case is made out
 28 by reference to the proposed intervenor’s papers alone; however, we do not foreclose
 consideration of the pleadings and affidavits of opponents to intervention, nor do we preclude
 district courts from holding a hearing when necessary to resolve ambiguities or conflicts.”
Southwest Center for Biological Diversity v. Berg, 268 F.3d 810, 820 (9th Cir. 2001).

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2 Dated: February 28, 2024

Respectfully submitted,

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5 By: /s/ Paul Karl Lukacs

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